failed to present for review at the administrative appeal level any objection to earlier processing practices,[103] or failed to administratively request a waiver of fees[104] or to challenge a fee waiver denial at the administrative appeal stage.[105]

"Open America" Stays of Proceedings

Even when a requester has constructively exhausted administrative remedies, due to an agency's failure to comply with the FOIA's time deadlines, the Act provides that a court may retain jurisdiction and allow the agency additional time to complete its processing of the request--ordinarily through issuance of a stay of the court proceedings--if it can be shown that "exceptional circumstances exist and that the agency is exercising due diligence in responding to the request."[106]

The leading case construing this important "safety valve" provision of the FOIA is Open America v. Watergate Special Prosecution Force.[107] In Open America, the Court of Appeals for the District of Columbia Circuit held that "exceptional circumstances" may exist when an agency can show that it "is deluged with a volume of requests for information vastly in excess of that anticipated by Congress [and] when the existing resources are inadequate to deal with the volume of such requests within the time limits of subsection (6)(A)."[108] The D.C. Circuit further ruled that the "due diligence" requirement may be satisfied by an agency's good faith processing of all requests on a "first-in/first-out" basis and that a requester's right to have his request processed out of turn requires a particularized showing of "exceptional need or urgency."[109] In so ruling, the D.C. Circuit rejected the notion that the mere filing of a lawsuit was a basis for such expedited treatment.[110]

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[103] See, e.g., Dettman, 802 F.2d at 1477.

[104] See Voinche, 983 F.2d at 669.

[105] See, e.g., Crooker v. CIA, No. 86-3055, slip op. at 4-5 (D.D.C. May 10, 1988).

[106] 5 U.S.C. § 552(a)(6)(C) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[107] 547 F.2d 605 (D.C. Cir. 1976).

[108] Id. at 616; see also Cohen v. FBI, 831 F. Supp. 850, 854 (S.D. Fla. 1993) (court "cannot focus on theoretical goals alone, and completely ignore the reality that these agencies cannot possibly respond to the overwhelming number of requests received within the time constraints imposed by FOIA").

[109] Open America, 547 F.2d at 616.

[110] Id. at 615; Cohen, 831 F. Supp. at 854 ("[L]ittle progress would result from allowing FOIA requesters to move to the head of the line by filing a lawsuit. This would do nothing to eliminate the FOIA backlog; it would merely add to the judiciary's backlog."). But see Exner v. FBI, 542 F.2d 1121, 1123 (9th Cir. 1976)

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LITIGATION CONSIDERATIONS

It must be recognized that the Electronic Freedom of Information Act Amendments of 1996[111] may have a very significant impact on the ability of some agencies to obtain Open America stays in the future. Although the Electronic FOIA amendments do not legislatively overturn the Open America decision, in a new subsection they do substantially limit it by providing that "the term `exceptional circumstances' does not include a delay that results from a predictable agency workload of requests . . . unless the agency demonstrates reasonable progress in reducing its backlog of pending requests."[112] The effect of this provision may be obviated somewhat by the fact that another new subsection specifies that a requester's unreasonable refusal to modify the scope of the request or to agree to an alternative time frame for the processing of the request "shall be considered as a factor in determining whether exceptional circumstances exist for purposes of this [provision]."[113]

When Open America's requirements are met, an agency can apply for a stay of judicial proceedings to obtain whatever additional time is necessary to complete the administrative processing of the request.[114] A reasonable stay may

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[110](...continued)
(adopting Judge Leventhal's concurring opinion in Open America and holding that filing of suit can move requester "up the line").

[111] Pub. L. No. 104-231, 110 Stat. 3048.

[112] 5 U.S.C.A. § 552(a)(6)(C)(ii) (West 1996 & Supp. 1997) (effective Oct. 2, 1997); see FOIA Update, Fall 1996, at 10; see also FOIA Update, Summer 1997, at 3-7 (advising agencies regarding reporting of backlog-related information in annual FOIA reports, beginning with annual reports for fiscal year 1998).

[113] 5 U.S.C.A. § 552(a)(6)(C)(iii) (West 1996 & Supp. 1997); see FOIA Update, Fall 1996, at 10; see also H.R. Rep. No. 104-795, at 24-25 (1996).

[114] See, e.g., Fiduccia v. United States Dep't of Justice, No. C-92-20319, 1997 U.S. Dist. LEXIS 2684, at **23-24 (N.D. Cal. Feb. 7, 1997) (granting FBI stay of approximately eight years for processing of approximately 1800 pages) (appeal pending); Jimenez v. FBI, 938 F. Supp. 21, 31-32 (D.D.C. 1996) (court retained jurisdiction and granted stay totaling approximately five years from date of request in view of FBI's "two track system and the large volume of documents expected to be responsive to plaintiff's request"); Cecola v. FBI, No. 94 C 4866, 1995 U.S. Dist. LEXIS 13253, at **6-8 (N.D. Ill. Sept. 8, 1995) (dismissing plaintiff's action without prejudice and allowing FBI more than six years from date of request to process documents); Fox v. United States Dep't of Justice, No. 94-4622, slip op. at 6-12 (C.D. Cal. Dec. 14, 1994) (granting stay until 1999 for request submitted to FBI in July 1993; agency required to file status report approximately one year after decision), appeal dismissed, No. 94-56788 (9th Cir. Feb. 21, 1995); Billington v. United States Dep't of Justice, No. 92-462, slip op. at 2-3 (D.D.C. July 27, 1992) (circumstances justify nearly three-year stay from date of order); Summers v. United States Dep't of Justice, 729 F. Supp. 1379, 1379 (D.D.C. 1989) (circumstances justify 22-month stay from date of order); cf.
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also be granted to permit the agency to consult with other agencies whose information is included in the responsive records, particularly when such review by the originating agency is mandatory.[115] In considering such applications in cases decided prior to the Electronic FOIA amendments taking effect, most courts have found "exceptional circumstances" when the agency is unable to meet the FOIA's time deadlines due to increased backlogs of requests and inadequate resources to handle them, and have found "due diligence" when the agency acts in good faith to process requests on a "first in/first out" basis.[116]

Nevertheless, in a decision rendered long before enactment of the Electronic FOIA amendments, a district court in Mayock v. INS,[117] ruled that Open America's requisites were not satisfied when processing delays resulted from a

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[114](...continued)
Ross v. Reno, No. 95-CV-1088, 1996 WL 612457, at **4-8 (E.D.N.Y. Aug. 13, 1996) (finding delay of approximately 33 months for processing of 14 pages of responsive material justified, but declining to grant government's request for stay of "an undetermined period of time").

[115] See, e.g., Gilmore v. United States Dep't of State, No. C 95-1098, slip op. at 25-26, 29 (N.D. Cal. Feb. 9, 1996) ("agency receiving requests for information classified by another agency `shall refer copies . . . to the originating agency for processing.'" (quoting Exec. Order No. 12,958 § 3.7(b), 3 C.F.R. 333 (1996), reprinted in 50 U.S.C. § 435 note (Supp. I 1996) and reprinted in abridged form in FOIA Update, Spring/Summer 1995, at 5-10)).

[116] See, e.g., Williamson v. INS, No. 91-2526, slip op. at 2 (5th Cir. May 4, 1992) (per curiam) (dicta) (due diligence employed in "responding to the seemingly limitless number of FOIA requests on a first in/first out basis"); Zuckerman v. FBI, No. 94-6315, slip op. at 8 (D.N.J. Dec. 6, 1995) (finding that "a flood of FOIA requests" and "profound understaffing" can constitute exceptional circumstances); Freeman v. United States Dep't of Justice, 822 F. Supp. 1064, 1967 (S.D.N.Y. 1993) ("Defendant has established that it faces exceptional circumstances in that it has a substantial backlog even though it processes requests as quickly as possible within its financial ability."). But see Gilmore v. FBI, No. 93-2117, slip op. at 1, 3 (N.D. Cal. July 26, 1994) (expediting request despite showing of due diligence and exceptional circumstances, providing only terse finding that "[p]laintiff has sufficiently shown that the information he seeks will become less valuable if the FBI processes his request on a first-in, first-out basis"); Laroque v. United States Dep't of Justice, No. 86-2677, slip op. at 1-2 (D.D.C. Aug. 11, 1987) (further stays denied because agency failed to process records during one year since previous court deadline and failed to give reason for delay); Ely v. United States Marshals Serv., No. 83-C-569-S, slip op. at 2 (W.D. Wis. Oct. 31, 1983) (stay denied because length of agency backlog had not improved in six years). See generally FOIA Update, Spring 1992, at 8-10; FOIA Update, Winter 1990, at 1-2.

[117] 714 F. Supp. 1558 (N.D. Cal. 1989), rev'd & remanded sub nom. Mayock v. Nelson, 938 F.2d 1066 (9th Cir. 1991).

"normal" backlog of routine requests.[118] Significantly, though, the Court of Appeals for the Ninth Circuit subsequently reversed and remanded Mayock, finding that it was unclear whether the district court had considered agency evidence that it had attempted to get increased funding to reduce its backlog.[119] Of course, once an "Open America" stay has been granted, "[i]t would make no sense to require the government to produce a Vaughn Index before the government has processed [the] FOIA request."[120] Nor can a requester effectively circumvent an "Open America" stay by the simple expedient of filing a new complaint based on the same request.[121]

It should be remembered that an "Open America" stay may be denied also when the requester can show an "exceptional need or urgency" for having his request processed out of turn.[122] Such a showing has been made in cases when the

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[118] 714 F. Supp. at 1565-66; accord Ray v. United States Dep't of Justice, 770 F. Supp. 1544, 1549 (S.D. Fla. 1990).

[119] 938 F.2d at 1007-08; see Gilmore v. NSA, No. 94-16165, 1995 U.S. App. LEXIS 38274, at **3-4 (9th Cir. Dec. 11, 1995) (district court appropriately denied declaratory and injunctive relief notwithstanding processing delays, when agency has increased size of its FOIA staff, implemented two-track, "first-in first-out" processing system, and agency "must undertake a painstaking review of voluminous sensitive documents before disclosing requested information"); see also Narducci v. United States Dep't of Justice, No. 91-2972, slip op. at 2 (D.D.C. June 16, 1992) (government's motion to dismiss denied when year had passed since request was made, it did not appear that request would be processed in near future, and FBI had not indicated that it had attempted to reduce its large backlog by proposing legislation or requesting additional staff); Rosenfeld v. United States Dep't of Justice, No. C-90-3576, slip op. at 8-13 (N.D. Cal. Feb. 18, 1992) ("exceptional circumstances" justifying processing stay not present when, despite substantial backlog, FBI made no significant effort to increase resources to satisfy FOIA obligations; nonetheless, FBI given one year to complete processing of 220,000 pages of records). But see Edmond v. United States Attorney, 959 F. Supp. 1, 3 n.2 (D.D.C. 1997) (expressly declining to follow Mayock and Narducci because "[t]his Court is not prepared at this time to second-guess decisions by the executive and legislative branches on administrative support and funding for the processing of FOIA requests in the absence of some evidence that the cooperative branches sought to circumvent the law"). See generally Ross, 1995 WL 612457, at **4-8 (insightful consideration of tension between allowing "exceptional circumstances" to become the norm and lack of adequate funding to reduce FOIA backlogs).

[120] Edmond, 959 F. Supp. at 5; see Cohen, 831 F. Supp. at 855.

[121] See Hunsberger v. United States Dep't of Justice, No. 94-0168, slip op. at 1-2 (D.D.C. May 3, 1994), summary affirmance granted, No. 94-5234 (D.C. Cir. Apr. 10, 1995).

[122] See Open America, 547 F.2d at 616; see also Aguilera v. FBI, 941 F. Supp.

(continued...)

requester's life or personal safety, or substantial due process rights, would be jeopardized by the failure to process a request immediately.[123] Although expedited processing has been judicially required only for these two primary reasons, the Department of Justice, as a matter of administrative policy, now also expedites FOIA requests when there is "widespread and exceptional media interest" in information which "involves possible questions about the government's integrity which affect public confidence."[124] In all instances, however, the burden of demonstrating "a genuine need and reason for urgency in gaining access to Government records" falls on the requester.[125]

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[122](...continued)
144, 149-52 (D.D.C. 1996) (initially finding that FBI satisfied "exceptional circumstances-due diligence test" warranting 87-month delay, but granting expedited access due to exigent circumstances).

[123] See, e.g., Ferguson v. FBI, 722 F. Supp. 1137, 1141-44 (S.D.N.Y. 1989) (need for documents, not otherwise available, in post-conviction challenge and upcoming criminal trial); Cleaver v. Kelley, 427 F. Supp. 80, 81 (D.D.C. 1976) (plaintiff facing multiple criminal charges carrying possible death penalty in state court); Boult v. Department of Justice, No. C76-1217A, slip op. at 3-4 (N.D. Ga. Oct. 22, 1976) (pending deportation that could endanger requester's physical safety); see also Florida Rural Legal Servs. v. United States Dep't of Justice, No. 87-1264, slip op. at 3-4 (S.D. Fla. Feb. 10, 1988) (processing priority granted to nonprofit organization needing list of undocumented aliens in order to assist them in making timely applications for legalization); FOIA Update, Summer 1983, at 3 ("OIP Guidance: When to Expedite FOIA Requests"); cf. Kitchen v. FBI, No. 94-5159, 1995 WL 311615, at *1 (D.C. Cir. Apr. 27, 1995) (per curiam) (requester has not shown sufficiently serious harm to warrant interlocutory appeal when deportation hearing not yet scheduled (citing Ray, 770 F. Supp. at 1550-51)); Billington v. United States Dep't of Justice, No. 92-462, slip op. at 3-5 (D.D.C. July 27, 1992) (expedited treatment denied despite pendency of prosecutions, when requester had not shown any likelihood that files contain "materially exculpatory information"). Compare Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 6 (D.D.C. Oct. 2, 1992) (expedited processing granted when scope of request limited, "Jencks Act" type material unavailable in state prosecution, and information useful to plaintiff's criminal defense might have been contained in requested documents), with Freeman v. United States Dep't of Justice, No. 92-557, slip op. at 11-12 (D.D.C. June 28, 1993) (denying further expedited treatment when processing "would require a hand search of approximately 50,000 pages, taking approximately 120 days").

[124] FOIA Update, Spring 1994, at 2 (encouraging other federal agencies to adopt similar policies); see also Revised Department of Justice Freedom of Information Act Regulations, 62 Fed. Reg. 45,184, 45,187 (1997) (to be codified at 28 C.F.R. § 16.5(d)(iv)) (proposed Aug. 26, 1997) (continuing policy).

[125] Open America, 547 F.2d at 615-16; see Edmond, 959 F. Supp. at 3; Ohaegbu v. FBI, 936 F. Supp. 8-9 (D.D.C. 1996), appeal dismissed for lack of prosecution, No. 96-5261 (D.C. Cir. Nov. 22, 1996); Lisee v. CIA, 741 F. Supp. (continued...)

LITIGATION CONSIDERATIONS

The Electronic FOIA amendments will also have an effect on the criteria and procedures governing requests for expedited processing: Agencies are now required to promulgate regulations providing for the granting of expedited treatment in cases of "compelling need" or "in other cases determined by the agency."[126] Statutorily, the term "compelling need" now codifies the traditional understanding that expedited treatment will be granted whenever the withholding of the requested records "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual."[127] Additionally, the Electronic FOIA amendments also specify that expedited processing will be granted when there exists, "with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity."[128]

Absent truly exceptional circumstances, though, courts have generally declined to order expedited processing when records are "needed" for post-judgment attacks on criminal convictions,[129] or for use in other civil litigation.[130] In addi-

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[125](...continued)
988, 989 (D.D.C. 1990).

[126] 5 U.S.C.A. § 552(a)(6)(E)(i) (West 1996 & Supp. 1997); see FOIA Update, Fall 1996, at 10.

[127] 5 U.S.C.A. § 552(a)(6)(E)(v)(I) (West 1996 & Supp. 1997).

[128] Id. § 552(a)(6)(E)(v)(II) (West 1996 & Supp. 1997); see also Revised Department of Justice FOIA Regulations, 62 Fed. Reg. at 45,187 (1997) (specifying procedures for expedited processing).

[129] See, e.g., Edmond, 959 F. Supp. at 4; Schweihs v. FBI, 933 F. Supp. 719, 723 (N.D. Ill. 1996) (expedited processing of records related to plaintiff's conviction denied, despite plaintiff's claims of ill health); Russell, No. 92-2546, slip op. at 2 (D.D.C. Mar. 5, 1993) ("[p]laintiff's claim that the requested information may `minister [his] defense in the civil proceeding and motion for a new trial' in his criminal proceeding" inadequate to justify expedition); Thompson v. FBI, No. 90-3020, slip op. at 3 (D.D.C. July 8, 1991); Shilling v. ATF, No. 90-1422, slip op. at 3 (D.D.C. Dec. 3, 1990); Crabtree v. United States Dep't of Justice, No. 88-0861, slip op. at 5 (D.D.C. Aug. 26, 1988); Antonelli v. FBI, No. 84-1047, slip op. at 2-3 (D.D.C. Nov. 13, 1984); Gonzalez v. DEA, 2 Gov't Disclosure Serv. (P-H) ¶ 81,016, at 81,069 (D.D.C. Nov. 20, 1980). But see Aguilera, 941 F. Supp. at 152-53 (ordering expedited processing for request not scheduled for completion for nearly 90 months because: "Plaintiff has demonstrated that he faces grave punishment, his reason to believe the documents may assist in his defense has been corroborated by objective proof, his request is limited in scope, and the criminal discovery process is unavailable.").

[130] See, e.g., Price v. CIA, No. 90-1507, slip op. at 2 (4th Cir. Oct. 2, 1990); Rogers v. United States Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 17 (N.D. Ala. Sept. 13, 1995) ("Courts have consistently rejected claims of urgency based on private litigation concerns."); Fox, No. 94-4622, slip op. at 10-
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tion, it has been held firmly that publishing deadlines are not sufficient grounds for expedited processing.[131] Employing an extremely unusual tactic, one plaintiff sought, in lieu of seeking expedited processing of his FOIA request, to have a federal court stay his state habeas corpus proceedings pending a response to his FOIA request.[132] Rejecting such a novel stay application, the court found that it was constrained by the constitutional doctrine of Younger v. Harris[133] from interfering in the state court proceedings.[134] (For a further discussion of expedited processing, see Procedural Requirements, above.)

When there is a large volume of responsive documents that have not been processed, instead of granting an unconditional "Open America" stay to the agency until all initial processing has been completed, a court may grant a stay that provides for interim or "timed" releases.[135] However, an "Open America" stay should, when necessary, include the time required for preparation of a

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[130](...continued)
11 (C.D. Cal. Dec. 14, 1994); Cohen, 831 F. Supp. at 854; Steffen v. United States Dep't of Justice, No. 89-3434, slip op. at 3 (D.D.C. July 12, 1990); Benny v. United States Dep't of Justice, No. 86-1172, slip op. at 5 (D.D.C. Oct. 21, 1986); Grandison v. DEA, No. 81-1001, slip op. at 2 (D.D.C. July 9, 1981); cf. Armstrong v. Bush, 807 F. Supp. 816, 819 (D.D.C. 1992) (priority accorded to additional FOIA requests added to those already subject of litigation, when responsive records might otherwise be destroyed).

[131] See, e.g., Freeman v. United States Dep't of Justice, 822 F. Supp. 1064, 1067 (S.D.N.Y. 1993) ("Plaintiff's desire to inform the public [through publication and submission to a Congressional committee], while commendable, does not constitute an exceptional need. Since almost every request can be linked to such a desire, granting expedited treatment for that purpose would allow the exception to swallow the rule."); Nation Magazine v. United States Dep't of State, 805 F. Supp. 68, 73 (D.D.C. 1992) ("[T]here are numerous reasons why this Court should not broaden the definition of `exceptional need or urgency' to include FOIA requests concerning Presidential candidates pending weeks before an election."); Lisee, 741 F. Supp. at 989; Summers v. United States Dep't of Justice, 733 F. Supp. 443, 444 (D.D.C. 1990), appeal dismissed on procedural grounds, 925 F.2d 450 (D.C. Cir. 1991); Summers v. United States Dep't of Justice, 729 F. Supp. 1379, 1379 (D.D.C. 1989); Mangold v. CIA, No. 88-1826, slip op. at 6-7 (D.D.C. May 3, 1989).

[132] Sosa v. FBI, No. 93-1126, slip op. at 1 (D.D.C. Nov. 4, 1993).

[133] 401 U.S. 37 (1971).

[134] Sosa, No. 93-1126, slip op. at 1 (D.D.C. Nov. 4, 1993).

[135] See, e.g., Samuel Gruber Educ. Project v. United States Dep't of Justice, No. 90-1912, slip op. at 6 (D.D.C. Feb. 8, 1991) (71,000 pages of documents); Hinton v. FBI, 527 F. Supp. 223, 223-25 (E.D. Pa. 1981) (21,000 pages of documents).

Vaughn Index.[136] While the Open America decision does not directly address the additional time needed by an agency to justify nondisclosure of any withheld records once they are processed, courts have, as a practical matter, tended to merge the record-processing and the affidavit-preparation stages when issuing stays of proceedings under Open America.[137]

Adequacy of Search

In many suits under the FOIA, the defendant agency will face challenges not only to its reliance on particular exemptions, but also to the manner in which, and extent to which, it has endeavored to locate responsive documents. (For a discussion of administrative considerations in conducting searches, see Procedural Requirements, above.) To prevail in a FOIA action, the agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements."[138] Thus, the agency is under a duty to conduct a "reasonable" search for responsive records.[139]

The adequacy of a search is necessarily "dependent upon the circumstances of the case."[140] The agency "must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."[141] In this connection, it is

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[136] See FOIA Update, Fall 1988, at 5.

[137] See, e.g., Lisee, 741 F. Supp. at 989-90 ("Open America" stay granted for both processing records and preparing Vaughn Index); Ettlinger v. FBI, 596 F. Supp. 867, 878-79 (D. Mass. 1984) (same); Shaw v. Department of State, 1 Gov't Disclosure Serv. (P-H) ¶ 80,250, at 80,630 (D.D.C. July 31, 1980) (same).

[138] Miller v. United States Dep't of State, 779 F.2d 1378, 1383 (8th Cir. 1985) (citing National Cable Television Ass'n v. FCC, 479 F.2d 183, 186 (D.C. Cir. 1973)).

[139] See, e.g., Patterson v. IRS, 56 F.3d 832, 841 (7th Cir. 1995); Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995); Oglesby v. United States Dep't of the Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Weisberg v. United States Dep't of Justice, 705 F.2d 1344, 1352 (D.C. Cir. 1983).

[140] Truitt v. Department of State, 897 F.2d 540, 542 (D.C. Cir. 1990); see also Maynard v. CIA, 986 F.2d 547, 559 (1st Cir. 1993) ("depends upon the facts of each case"); Kronberg v. United States Dep't of Justice, 875 F. Supp. 861, 869 (D.D.C. 1995) (same).

[141] Oglesby, 920 F.2d at 68; see Maynard, 986 F.2d at 559; SafeCard Servs. v. SEC, 926 F.2d 1197, 1201 (D.C. Cir. 1991); see also Goland v. CIA, 607 F.2d 339, 353 (D.C. Cir. 1978) (production of records not previously segregated required only when material can be identified with reasonable effort), vacated in nonpertinent part & reh'g denied, 607 F.2d 367 (D.C. Cir. 1979); Keenan v. United States Dep't of Justice, No. 94-1909, slip op. at 6 (D.D.C. Apr. 25, 1996)

(continued...)

firmly settled that the fundamental question is not "`whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate.'"[142] Indeed, it has been held that "the search

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[141](...continued)
("A search for all documents referring to an `FBI representative' is an unreasonably burdensome search and the CIA is therefore not obligated to undertake it."); Crompton v. Criminal Div., No. CV 95-8176, slip op. at 10 (C.D. Cal. Apr. 1, 1996) (search adequate when "Criminal Division would search for documents relevant to the plaintiff for its own uses in the same manner that it attempted to locate any documents responsive to the plaintiff's FOIA request"); Spannaus v. United States Dep't of Justice, No. 92-372, slip op. at 5 (D.D.C. June 20, 1995) (unreasonable to require search through files of agency employees who had no significant involvement with, nor maintained separate files on, subject of request), summary affirmance granted in relevant part & remanded in part, No. 95-5267 (D.C. Cir. Aug. 16, 1996); Kubany v. Board of Governors, Fed. Reserve Sys., No. 93-1428, slip op. at 8-9 (D.D.C. July 19, 1994) ("The FOIA does not require an agency to undertake the openended, broadbased, and ill-defined searches requested by the plaintiff."); Spannaus v. CIA, 841 F. Supp. 14, 18 (D.D.C. 1993) ("FOIA does not require . . . a burdensome tape-by-tape listening search" of hundreds of 90-minute audiotapes); Dettman v. United States Dep't of Justice, No. 82-1108, slip op. at 8 (D.D.C. Mar. 21, 1985) (government expected to operate under "reasonable plan designed to produce the requested documents"), aff'd on other grounds, 802 F.2d 1472 (D.C. Cir. 1986).

[142] Steinberg v. United States Dep't of Justice, 23 F.3d 548, 551 (D.C. Cir. 1994) (quoting Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984)); see Citizens Comm'n, 45 F.3d at 1328 (same); see also Nation Magazine v. United States Customs Serv., 71 F.3d 885, 892 n.7 (D.C. Cir. 1995) ("there is no requirement that an agency [locate] all responsive documents"); Ethyl Corp. v. EPA, 25 F.3d 1241, 1246 (4th Cir. 1994) ("In judging the adequacy of an agency search for documents the relevant question is not whether every single potentially responsive document has been unearthed . . . ."); In re Wade, 969 F.2d at 249 n.11; Meeropol v. Meese, 790 F.2d 942, 952-53 (D.C. Cir. 1986) ("a search is not unreasonable simply because it fails to produce all relevant material; no search of this [large] size . . . will be free from error"); Miller, 779 F.2d at 1385 ("[P]laintiff alleges that the search was insufficient because the Department did not do all that it could; we agree . . . however, that it did all the Act required."); Freeman v. United States Dep't of Justice, No. 90-2754, slip op. at 3 (D.D.C. Oct. 16, 1991) ("The FOIA does not require that the government go fishing in the ocean for fresh water fish."); Fitzgibbon v. United States Secret Serv., 747 F. Supp. 51, 54 (D.D.C. 1990) (paucity of documents produced held to be "of no legal consequence" when search is shown to be reasonable); U.S. News & World Report v. Department of the Treasury, No. 84-2303, slip op. at 5 (D.D.C. Oct. 29, 1985) ("[T]he reasonableness standard does not require that defendant conduct a gambol through branches of the agency where responsive documents are unlikely to be found.").

need only be reasonable; it does not have to be exhaustive."[143] In sum, while the initial burden certainly rests with the agency to demonstrate the adequacy of the search,[144] once that obligation is satisfied, the agency's position can be rebutted "only by showing that the agency's search was not made in good faith."[145]

Consequently, a requester's "`[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them.'"[146] Even when the fact that a requested docu

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[143] Miller, 779 F.2d at 1383 (citing Shaw v. United States Dep't of State, 559 F. Supp. 1053, 1057 (D.D.C. 1983)).

[144] See Patterson, 56 F.3d at 840; Maynard, 986 F.2d at 560; Miller, 779 F.2d at 1378; Weisberg, 705 F.2d at 1351.

[145] Maynard, 986 F.2d at 560 (citing Miller, 779 F.2d at 1383); see, e.g., Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994); Weisberg, 705 F.2d at 1351-52; Triestman v. United States Dep't of Justice, 878 F. Supp. 667, 672 (S.D.N.Y. 1995); U.S. News, No. 84-2303, slip op. at 3 (D.D.C. Oct. 29, 1985) ("Plaintiff's burden of proof on the issue of agency bad faith is heavy indeed . . . ."); see also Wright v. IRS, No. Civ. S-95-0483, slip op. at 3 (E.D. Cal. Oct. 17, 1995) ("Although the decoding information provided plaintiff is far from helpful and of doubtful accuracy, the IRS has represented that this information is all that it has. The court has no reason to question that representation, and therefore cannot order further disclosure."); cf. Harvey v. United States Dep't of Justice, No. CV 92-176, slip op. at 10 (D. Mont. Jan. 9, 1996) ("The purported bad faith of government agents in separate criminal proceedings is irrelevant to [the] question of the adequate, good faith search for documents responsive to a FOIA request."), aff'd on other grounds, 116 F.3d 484 (9th Cir. 1997) (unpublished table decision).

[146] Steinberg, 23 F.3d at 552 (quoting SafeCard, 926 F.2d at 1201); see also Oglesby, 920 F.2d at 67 n.13 (adequacy of agency's search not undercut by requester's speculative claim that other records "must exist" due to perceived importance of subject matter; "hypothetical assertions are insufficient to raise a material question of fact with respect to the adequacy of the agency's search"); Chamberlain v. United States Dep't of Justice, 957 F. Supp. 292, 294 (D.D.C. 1997) ("It is well established that `[a]gency affidavits enjoy a presumption of good faith that withstand[s] purely speculative claims about the existence and discoverability of other documents.'" (quoting Albuquerque Publ'g Co. v. United States Dep't of Justice, 726 F. Supp. 851, 860 (D.D.C. 1989)) (appeal pending); Spannaus, No. 92-372, slip op. at 6 (D.D.C. June 20, 1995) (plaintiff's unsubstantiated assertion that documents released by other agencies must also be maintained in files of U.S. Attorney's Office held insufficient to overcome "detailed affidavits describing the numerous searches undertaken to locate documents responsive to plaintiff's request"); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 10 (D.D.C. 1995) ("Nor can plaintiff rely on unsupported inferences that other documents must have been created."), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Okon v. IRS, No. 91-660, slip op. at 8-9 (D.N.M. Jan. 12, 1995)

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ment once existed is undisputed, summary judgment will not be defeated by an unsuccessful search for the document, so long as the search was diligent.[147]

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[146](...continued)
("Ms. Okon has articulated intelligent and logical reasons why she believes other documents responsive to her FOIA request may exist. That fact notwithstanding, I cannot say the search undertaken was not reasonably calculated to uncover all responsive documents."); Berg v. United States Dep't of Energy, No. 94-0488, slip op. at 7 (D.D.C. Nov. 7, 1994) ("A handwritten note at the bottom of another office memorandum which refers to a `briefing' does not create the requisite sustainable inference [that additional records exist], especially when considered with a sworn statement to the contrary from an agency official."); Spannaus, 841 F. Supp. at 17-18 ("Plaintiff's strong belief that responsive material must exist . . . is nothing more than speculation . . . ."); Stone v. Defense Investigative Serv., 816 F. Supp. 782, 786 (D.D.C. 1993) (rejecting plaintiff's assertions of existence of additional records absent any supporting proof), appeal dismissed for failure to prosecute,
No. 93-5170 (D.C. Cir. Mar. 11, 1994); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1295 (N.D. Cal. 1992) ("Plaintiff's incredulity at the fact that no responsive documents were uncovered . . . does not constitute evidence of unreasonableness or bad faith."); U.S. News, No. 84-2303, slip op. at 4-5 (D.D.C. Oct. 29, 1985) (dismissing as "speculation" argument that search was undermined by absence of additional records that were referenced in released documents). But see Meyer v. Federal Bureau of Prisons, 940 F. Supp. 9, 14 (D.D.C. 1996) (reference to responsive pages in agency memorandum, coupled with equivocal statement in declaration that it "appears" responsive pages do not exist, requires further clarification by agency); Katzman v. Freeh, 926 F. Supp. 316, 320 (E.D.N.Y. 1996) (because additional documents were referenced in released documents, summary judgment was withheld "until defendant releases these documents or demonstrates that they either are exempt from disclosure or cannot be located").

[147] See Maynard, 986 F.2d at 564 ("`The fact that a document once existed does not mean that it now exists; nor does the fact that an agency created a document necessarily imply that the agency has retained it.'" (quoting Miller, 779 F.2d at 1385)); Code v FBI, No. 95-1892, 1997 WL 150070, at *4 (D.D.C. Mar. 26, 1997) (same); see also Nation Magazine, 71 F.3d at 892 n.7 ("Of course, failure to turn up [a specified] document does not alone render the search inadequate."); Citizens Comm'n, 45 F.3d at 1328 (adequacy of search not undermined by inability to locate 137 out of 1000 volumes of responsive material, absent evidence of bad faith, and when affidavit contained detailed, nonconclusory account of search); Antonelli v. United States Parole Comm'n, No. 93-0109, slip op. at 2 (D.D.C. Feb. 23, 1996) ("While it is undisputed that [plaintiff] provided the U.S. Marshals Service with a copy of the document he now seeks, the fact that the USMS cannot find it is not evidence of an insufficient search."); Shewchun v. INS, No. 95-1920, slip op. at 7 (D.D.C. Dec. 10, 1995) ("Nor does plaintiff's identification of undisclosed documents that he has obtained through other sources render the search unreasonable."), summary affirmance granted, No. 97-5044 (D.C. Cir. June 5, 1997). But cf. Kronberg, 875 F. Supp. at 870-71
(continued...)

Indeed, "[n]othing in the law requires the agency to document the fate of documents it cannot find."[148] And when agencies do subsequently locate additional documents, or documents initially believed to have been lost or destroyed, courts have accepted this as evidence of the agency's good-faith efforts.[149]

Although an agency's search may be found insufficient if the court concludes that it interpreted the scope of the request too narrowly,[150] the Court of Appeals for the District of Columbia Circuit has expressly held that an agency "is not obligated to look beyond the four corners of the request for leads to the location of responsive documents."[151] Nor is an agency required to undertake a new search based on a subsequent clarification of a request, after the requester

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[147](...continued)
(government required to provide additional explanation for absence of documentation required by statute and agency regulations to be created, when plaintiff presented evidence that other files, reasonably expected to contain responsive records, were not identified as having been searched).

[148] Roberts v. United States Dep't of Justice, No. 92-1707, 1995 WL 356320, at *2 (D.D.C. Jan. 28, 1993); see Shewchun, No. 95-1920, slip op. at 7 (D.D.C. Dec. 10, 1995); see also Miller, 779 F.2d at 1385 ("Thus, the Department is not required by the Act to account for documents which the requester has in some way identified if it has made a diligent search for those documents in places in which they might be expected to be found . . . .").

[149] See Maynard, 986 F.2d at 565 ("Rather than bad faith, we think that the forthright disclosure by the INS that it had located the misplaced file suggests good faith on the part of the agency."); Meeropol, 790 F.2d at 953; Goland, 607 F.2d at 370 (revelation one week following decision by court of appeals that agency had discovered numerous, potentially responsive, additional documents several months earlier, insufficient to undermine validity of agency's prior search); Gilmore v. NSA, No. 92-3646, slip op. at 21-22 (N.D. Cal. Apr. 30, 1993) (acceptance of plaintiff's "`perverse theory that a forthcoming agency is less to be trusted in its allegations than an unyielding agency'" would "`work mischief in the future by creating a disincentive for the agency to reappraise its position'" (quoting Military Audit Project v. Casey, 656 F.2d 724, 754 (D.C. Cir. 1981))); U.S. News, No. 84-2303, slip op. at 3 (D.D.C. Oct. 29, 1985) ("It is true that defendant's processing of plaintiff's FOIA request has been fraught with problems, but each can be characterized as an honest mistake. Defendant has acted promptly to clarify misunderstandings as they have come to light . . . .").

[150] See, e.g., Nation Magazine, 71 F.3d at 889-91 (agency improperly limited scope of request to records indexed under subject's name when request also sought information "pertaining to" subject; related subject matter files should have been searched also); see also FOIA Update, Fall 1995, at 3-5 ("OIP Guidance: Determining the Scope of a FOIA Request").

[151] Kowalczyk v. Department of Justice, 73 F.3d 386, 389 (D.C. Cir. 1996).

has examined the documents released.[152] The D.C. Circuit has observed that "[r]equiring an additional search each time the agency receives a letter that clarifies a prior request could extend indefinitely the delay in processing new requests"[153] and that "if the requester discovers leads in the documents he receives from the agency, he may pursue those leads through a second FOIA request."[154] Moreover, in extraordinarily onerous cases, an agency may not be compelled to undertake a requested search that is of such enormous magnitude as to make it "unreasonably burdensome."[155]

As a general principle, then, "[t]here is no requirement that an agency search every record system."[156] Accordingly, it has been held that the FBI is not required to search beyond its indices in pro se cases when the requester has refused to pay the cost of the search, unless the requester pinpoints a specific file.[157] Additionally, the FBI's search of its indices has been deemed "reasonable" when it has searched through "main files" (when the subject of the request was the subject of the file) and "cross" or "see references" (when the subject of the request was merely mentioned in a file in which another individual or organization was the subject).[158] Similar indices searches by other agencies,

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[152] See id. at 388.

[153] Id.

[154] Id. at 389.

[155] Nation Magazine, 71 F.3d at 891-92 (rejecting demand that agency search "through 23 years of unindexed files for records pertaining" to subject, while remanding for focus on narrower search for dated memorandum in files indexed chronologically).

[156] Oglesby, 920 F.2d at 68 (and cases cited therein); see Chamberlain, 957 F. Supp. at 294; Moore v. Aspin, 916 F. Supp. 32, 35 (D.D.C. 1996).

[157] See Ely v. FBI, No. 84-1615, slip op. at 2-3 (D.D.C. Jan. 28, 1985); cf. Greenberg v. FBI, No. 92-2218, slip op. at 2-3 (D.D.C. Sept. 15, 1993) (because requester was "inextricably linked" to organization that had been subject to FBI surveillance and FBI was so advised, FBI indices search under requester's name alone held inadequate). But see LaRouche v. Webster, No. 75-6010, slip op. at 10 (S.D.N.Y. Oct. 23, 1984) (FBI must search all specialized files on subject of request about which requester is unlikely to know).

[158] See Master v. FBI, 926 F. Supp. 193, 196-97 (D.D.C. 1996), summary affirmance granted, No. 96-5325, 1997 WL 369460 (D.C. Cir. June 2, 1997); Beauman v. FBI, No. CV-92-7603, slip op. at 9 (C.D. Cal. Apr. 28, 1993); Lawyers Comm. for Human Rights v. INS, 721 F. Supp. 552, 567 n.12 (S.D.N.Y. 1989); Freeman v. United States Dep't of Justice, No. 85-0958A, slip op. at 6 (E.D. Va. Mar. 12, 1986), aff'd, 808 F.2d 834 (4th Cir. 1986) (unpublished table decision); Friedman v. FBI, 605 F. Supp. 306, 311 (N.D. Ga. 1981); Stern v. United States Dep't of Justice, No. 77-3812-C, slip op. at 7 (D. Mass. Aug. 25, 1980); see also Kowalczyk, 73 F.3d at 389. But see Summers v. United States

(continued...)

either manually or by computer, have also been approved as adequate.[159]

It has frequently been held that agencies that maintain field offices in various locations are not ordinarily obligated to search offices other than those to which the request has been directed.[160] Similarly, it has also been held that

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[158](...continued)
Dep't of Justice, No. 89-3300, slip op. at 6 (D.D.C. June 13, 1995) (despite retrieval of over 30,000 responsive pages, FBI Central Records System indices search for documents pertaining to former FBI Director J. Edgar Hoover's telephone logs and appointment calendars held inadequate when agency declaration "does not explain the search terms used, the type of search performed and does not aver `that all files likely to contain responsive materials . . . were searched'").

[159] See, e.g., Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 230 (1st Cir. 1994) (U.S. Attorney's Office search of computerized record system sufficient); Maynard, 986 F.2d at 562 (Treasury Department properly limited its search to its automated Treasury Enforcement Communications System ("TECS")); Jimenez v. FBI, 938 F. Supp. 21, 26 (D.D.C. 1996) (ATF search of "its `primary law enforcement computer records system, which indexes all ATF law enforcement records, including those located in regional offices'" held adequate); Jimenez v. FBI, 910 F. Supp. 5, 7 (D.D.C. 1996) ("The IRS has fully discharged its obligations under the Freedom of Information Act by conducting a thorough search of its database."); Jacoby v. HUD, No. 95-893, slip op. at 3 (D.D.C. July 28, 1995) ("The database [HUD] searched was appropriate to the request."); Manna v. United States Dep't of Justice, 832 F. Supp. 866, 875 (D.N.J. 1993) (DEA indices search held adequate; "district courts have sanctioned the use of general indices maintained on computer systems or even index cards to locate responsive documents as a reasonable search technique"); Manna v. United States Dep't of Justice, 815 F. Supp. 798, 817-18 (D.N.J. 1993) (indices search by U.S. Attorney's Office held adequate), aff'd on other grounds, 51 F.3d 1158 (3d Cir.), cert. denied, 116 S. Ct. 477 (1995). But see Steinberg v. United States Dep't of the Treasury, No. 93-2348, slip op. at 8 (D.D.C. Sept. 18, 1995) (search solely of Treasury Enforcement Communications System ("TECS") held inadequate when "it is reasonable to conclude that additional systems exist," that TECS does not include these record systems, and that it would not be unduly burdensome to search other systems).

[160] See, e.g., Kowalczyk, 73 F.3d at 389 (When "the requester clearly states that he wants all agency records . . . regardless of their location, but fails to direct the agency's attention to any particular office other than the one receiving the request, then the agency need pursue only a lead . . . that is both clear and certain."); Church of Scientology v. IRS, 792 F.2d 146, 150 (D.C. Cir. 1986) (when agency regulations require requests be made to specific offices for specific records, no need to search additional offices when those regulations are not followed); Marks v. United States Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978) (no duty to search FBI field offices when requester directed request only to FBI Headquarters and did not specify which field offices he wanted searched);
(continued...)

"[b]ecause the scope of a search is limited by a plaintiff's FOIA request, there is no general requirement that an agency search secondary references or variant spellings."[161]

Of course, when a requester has set limitations on the scope of his request, either at the administrative stage[162] or in the course of litigation,[163] he cannot

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[160](...continued)
Spannaus, No. 92-372, slip op. at 6-7 (D.D.C. June 20, 1995) (agency not required to search files of individual known to be connected with bankruptcy proceedings when request sought records on proceedings, not on individual); Church of Scientology Int'l v. IRS, No. 90-2567, slip op. at 5-6 (C.D. Cal. Aug. 2, 1991) (when request plainly limited to IRS national and international offices, IRS under no obligation to search offices other than those specified); Marrera v. United States Dep't of Justice, 622 F. Supp. 51, 54 (D.D.C. 1985) ("There is no requirement that an agency search every division or field office in response to a FOIA request, especially where the requester has indicated specific areas where responsive documents might be located . . . ."); cf. American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1278 (D.D.C. 1986) (agency's refusal to perform canvass of 356 bureau offices for multitude of files held justified), aff'd, 907 F.2d 203 (D.C. Cir. 1990). But cf. Krikorian v. United States Dep't of State, 984 F.2d 461, 468-69 (D.C. Cir. 1993) (on remand, district court must explain why it was unnecessary for agency to search 11 regional security offices identified in article which formed basis for plaintiff's request); Kitchen v. FBI, No. 93-2382, slip op. at 5 (D.D.C. Mar. 18, 1996) (FBI required to justify lack of search of field offices when plaintiff's request to FBI Headquarters specified particular field offices to be searched, even though FBI notified requester of address of those offices and instructed him to request records directly from field offices); Harvey, No. CV 92-176, slip op. at 11-12 (D. Mont. Jan. 9, 1996) (plaintiff's reference to file prepared by FBI Special Agent in Wyoming "should have alerted the FBI to the need to search beyond the agency's Central Records system").

[161] Maynard, 986 F.2d at 560. But see Canning v. United States Dep't of Justice, No. 92-0463, slip op. at 21-22 (D.D.C. Nov. 3, 1994) (when records on subject of request filed under two different names and agency is aware of the dual filing, agency obligated to search under both names, especially after requester brought second name to agency's attention); Lesar v. United States Dep't of Justice, No. 92-2216, slip op. at 6 (D.D.C. Oct. 18, 1993) (in responding to request for information regarding FBI "executive conferences" pertaining to JFK assassination, FBI required to search its "executive conference" main file in addition to JFK assassination file).

[162] See Nation Magazine v. Department of State, No. 92-2303, slip op. at 13-15 (D.D.C. Aug. 18, 1995) (search limited to single DEA field office based on information supplied in request held "particularly appropriate here due to the fact that DEA must manually search its noninvestigative records").

[163] See id. at 15-16 (plaintiff bound to scope of request as narrowed in litiga-

subsequently challenge the adequacy of the search on the ground that the agency limited its search accordingly. Moreover, the Court of Appeals for the D. C. Circuit has held that when the subject of a request is implicated in several separate matters, but information is sought regarding only one of them, an agency is not automatically obligated to extend the search to other files or documents referenced in material retrieved in response to the initial search, so long as that search was complete and reasonable.[164]

Similarly, with respect to the processing of "cross" or "see references," only those portions of the file which pertain directly to the subject of the request are considered within the scope of the request.[165] As one court has phrased it: "To require the government to release an entire document where plaintiff's name is only mentioned a few times would be to impose on the government a burdensome and time consuming task."[166] With respect to a document in the requester's file which pertained entirely to a third party, one court has held that "[g]iven the lack of any relation between these pages and [the requester], as well as the minimal information that would remain after redaction, [the agency's] decision not to release these documents was not erroneous."[167]

To prove the adequacy of its search, as in sustaining its claims of exemption, an agency may rely upon affidavits (see the discussion of Vaughn Indexes, below), provided that they are "relatively detailed, nonconclusory, and submitted in good faith."[168] Such affidavits must show "that the search method was

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[163](...continued)
tion).

[164] Steinberg, 23 F.3d at 552 (Otherwise "an agency . . . might be forced to examine virtually every document in its files, following an interminable trail of cross-referenced documents like a chain letter winding its way through the mail."); see also Canning v. United States Dep't of Justice, 848 F. Supp. 1037, 1050 (D.D.C. 1994) (adequacy of search not undermined by fact that requester has received additional documents mentioning subject through separate request, when such documents are "tagged" to name of subject's associate).

[165] See Posner v. Department of Justice, 2 Gov't Disclosure Serv. (P-H) ¶ 82,229, at 82,650 (D.D.C. Mar. 9, 1982).

[166] Dettman, No. 82-1108, slip op. at 5-6 (D.D.C. Mar. 21, 1985); see also Osborne v. United States Dep't of Justice, No. 84-1910, slip op. at 2-3 (D.D.C. Feb. 28, 1985) (DEA search of relevant records systems and case files regarding requester held sufficient); Dunaway v. Webster, 519 F. Supp. 1059, 1083 (N.D. Cal. 1981).

[167] Greenspun v. IRS, No. 84-3426, slip op. at 4 (D.D.C. Sept. 30, 1985).

[168] Pollack v. Bureau of Prisons, 879 F.2d 406, 409 (8th Cir. 1989); see Miller, 779 F.2d at 1383; Weisberg, 705 F.2d at 1351; Perry v. Block, 684 F.2d 121, 127 (D.C. Cir. 1982) ("[A]ffidavits that explain in reasonable detail the scope and method of the search conducted by the agency will suffice to demonstrate com-
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reasonably calculated to uncover all relevant documents" and must "identify the terms searched or explain how the search was conducted."[169] It is not necessary that the agency employee who actually performed the search supply an affidavit describing the search; rather, the affidavit of an official responsible for supervising or coordinating the search efforts should be sufficient to fulfill the personal knowledge requirement of Rule 56(e) of the Federal Rules of Civil Procedure.[170]

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[168](...continued)
pliance with the obligations imposed by the FOIA."); Goland, 607 F.2d at 352; Triestman, 878 F. Supp. at 672 ("[A]ffidavits attesting to the thoroughness of an agency search of its records and its results are presumptively valid."); Grove v. United States Dep't of Justice, 802 F. Supp. 506, 518 (D.D.C. 1992); Pacific Sky Supply, Inc. v. Department of the Air Force, No. 86-2044, slip op. at 10 (D.D.C. Sept. 29, 1987) (affidavits held to sufficiently describe adequate search "[i]n the absence of countervailing evidence or apparent inconsistency of proof"); see also FOIA Update, Jan. 1983, at 6.

[169] Oglesby, 920 F.2d at 68 (although agency not required to search "every" record system, "[a]t the very least, [it] was required to explain in its affidavit that no other record system was likely to produce responsive documents"); see Maynard, 986 F.2d at 559 ("The affidavit should additionally `describe at least generally the structure of the agency's file system which makes further search difficult.'" (quoting Church of Scientology, 792 F.2d at 151)); see also U.S. News, 84-2303, slip op. at 6 (D.D.C. Oct. 29, 1985) (agency need only demonstrate that it "has routed plaintiff's request to the agency subunits reasonably likely to house responsive documents and that the officials in those subunits aver that they have thoroughly searched their files for the material requested by plaintiff, and describe their search methods"). Compare Knight v. FDA, 938 F. Supp. 710, 716 (D. Kan. 1996) (agency not required to explain all of its records systems in detail; "The FDA here met its minimum obligation by stating that no other component's record system was reasonably likely to have responsive documents."), with Nation Magazine v. United States Customs Serv., 937 F. Supp. 39, 43-44 (D.D.C. 1996) (requiring Customs Service to "fully describe all of its records" systems and "explicitly describe which records were searched and . . . justify the failure to search all others").

[170] See, e.g., Carney, 19 F.3d at 814 (affirming district court holding, No. 92-CV-6204, slip op. at 11-12 (W.D.N.Y. Apr. 27, 1993), to effect that: "There is no basis in either the statute or the relevant caselaw to require that an agency effectively establish by a series of sworn affidavits a `chain of custody' over its search process. The format of the proof submitted by defendant--declarations of supervisory employees, signed under penalty of perjury--is sufficient for purposes of both the statute and Fed.R.Civ.P. 56."); Maynard, 986 F.2d at 560 ("[A]n agency need not submit an affidavit from the employee who actually conducted the search. Instead, an agency may rely on an affidavit of an agency employee responsible for supervising the search."); SafeCard, 926 F.2d at 1202 (employee "in charge of coordinating the [agency's] search and recovery efforts [is] most appropriate person to provide a comprehensive affidavit"); Meeropol, 790 F.2d at 951 (supervisor/affiant properly relied on information provided by personnel who
(continued...)

(For a further discussion of this "personal knowledge" requirement, see Summary Judgment, below.)

An inadequate description of the search process, or a description which reveals an inadequate search, will necessitate denial of summary judgment.[171] For example, summary judgment has been denied when the agency's affidavit described circumstances in which destruction of the requested records may have occurred, but the affidavit failed to specify that destruction had in fact occurred.[172] Summary judgment has also been denied when staff members conducting the search received inadequate instructions as to what could be considered a

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[170](...continued)
actually performed search); Spannaus v. United States Dep't of Justice, No. 85-1015, slip op. at 7 (D. Mass. July 13, 1992) (when third party claimed to have knowledge of additional documents, affidavit of agency employee who contacted that party found sufficient); Pennsylvania Dep't of Pub. Welfare v. HHS, No. 84-0690, slip op. at 3-4 (M.D. Pa. Nov. 10, 1985) (affidavits of supervisory officials who directed search held adequate); see also Patterson, 56 F.3d at 841 (declarant's reliance on standard search form completed by his predecessor held appropriate); cf. Katzman v. CIA, 903 F. Supp. 434, 438-39 (E.D.N.Y. 1995) (when agency initially misidentified requester's attorney as subject of request, declaration from agency's FOIA coordinator held inadequate; declarations required from supervisors in each of agency's three major divisions attesting that search was conducted for correct subject); Mehl v. EPA, 797 F. Supp. 43, 46 (D.D.C. 1992) (although agency employee with "firsthand knowledge" of relevant files was appropriate person to supervise search undertaken by contractor, affidavit must also describe search). But see Linn v. United States Dep't of Justice, No. 92-1406, slip op. at 22-23 (D.D.C. Aug. 22, 1995) (rejecting statement by Bureau of Prisons attorney stationed in Washington, D.C. that search of prison in Texas located no records).

[171] See, e.g., Steinberg, 23 F.3d at 552 (description of search inadequate when it failed "to describe in any detail what records were searched, by whom, and through what process"); Oglesby, 920 F.2d at 68; Katzman, 926 F. Supp. at 320 (description of search rejected when, in successive affidavits, number of file sought, as reported by affiant, varied by one digit); Southam News v. INS, 674 F. Supp. 881, 889-91 (D.D.C. 1987); Hydron Lab., Inc. v. EPA, 560 F. Supp. 718, 721 (D.R.I. 1983); see also Applegate v. NRC, 3 Gov't Disclosure Serv. (P-H) ¶ 83,081, at 83,614 (D.D.C. Jan. 18, 1983) (permitting discovery on adequacy of search), summary judgment granted, 3 Gov't Disclosure Serv. (P-H) ¶ 83,201, at 83,887 (D.D.C. May 24, 1983) (ruling in favor of agency but finding it "disturbing" that agency designed "a filing and oral search system which could frustrate the clear and express purposes of FOIA").

[172] See Pafenberg v. Department of the Army, No. 82-2113, slip op. at 12 (D.D.C. Nov. 22, 1983) ("Casual destruction of [the requested] materials seems unlikely, and cannot be demonstrated by the conjecture of one official, where defendants have themselves admitted the existence of a body of information pertaining to the handling of the requested materials.").

"personal" record as opposed to an "agency" record.[173] If an agency's search is disputed, a grant of summary judgment to the agency may be reversed and remanded when the district court fails to expressly hold that a disputed search was adequate under the "reasonableness" standard.[174]

Mootness

In a FOIA action, the courts can afford a requester relief only when an agency has improperly withheld agency records.[175] Therefore, if during the litigation of a FOIA lawsuit it is determined that all documents found responsive to the underlying FOIA request have been released in full to the requester, the suit should be dismissed on mootness grounds as there is no justiciable controversy.[176]

Dismissal of a FOIA lawsuit can be appropriate also when the plaintiff fails to prosecute the suit.[177] Dismissal likewise may be appropriate when: (1) records

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[173] See Ethyl Corp., 25 F.3d at 1247-48.

[174] See Krikorian, 984 F.2d at 468 (requiring express findings by district court on adequacy of search issue).

[175] See 5 U.S.C. § 552(a)(4)(B) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

[176] See In re Wade, 969 F.2d 241, 248 (7th Cir. 1992); Tijerina v. Walters, 821 F.2d 789, 799 (D.C. Cir. 1987); Carter v. VA, 780 F.2d 1479, 1481 (9th Cir. 1986); DeBold v. Stimson, 735 F.2d 1037, 1040 (7th Cir. 1984); Perry v. Block, 684 F.2d 121, 125 (D.C. Cir. 1982); Crooker v. United States Dep't of State, 628 F.2d 9, 10 (D.C. Cir. 1980); see also, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 842 (6th Cir. 1988) (full disclosure of records pursuant to court order moots appeal); Gilbert v. Social Sec. Admin., No. 93-C-1055, slip op. at 9-10 (E.D. Wis. Dec. 28, 1994) (when sole dispute was whether agency had previously delivered all responsive records to plaintiff, case dismissed as moot upon agency's filing of proof of service of another copy of records); cf. Anderson v. HHS, 907 F.2d 936, 941 (10th Cir. 1990) (although plaintiff had already obtained all responsive documents, subject to protective order, in private civil litigation, plaintiff's FOIA litigation to obtain documents free from any such restriction remained viable).

[177] See, e.g., Antonelli v. Executive Office for United States Attorneys, No. 92-2416, slip op. at 2 (7th Cir. June 6, 1994) (affirming district court's dismissal of complaint when, seven months after plaintiff's complaint was found defective for lack of specificity, plaintiff had failed to amend); Nuzzo v. FBI, No. 95-cv-1708, 1996 U.S. Dist. LEXIS 15594, at **8-10 (D.D.C. Oct. 8, 1996) (after appropriate warning, dismissing action against several defendants because of plaintiff's failure to respond to motions for summary judgment); Ahmed v. Reno, No. 94-2438, slip op. at 2 (D.D.C. Nov. 15, 1995) (dismissing case "seven months since the Court first warned plaintiff that he must prosecute this case or face dismissal" and four months following filing of defendants' motion for

(continued...)

are publicly available upon payment of fees;[178] (2) a complete factual record has yet to be presented to the agency;[179] (3) there is a change in the factual circumstances underlying the lawsuit;[180] or (4) the agency is processing responsive records.[181] However, it has been held that a FOIA claim may survive the death of the plaintiff and, under some circumstances, may be continued by a properly substituted party.[182]

In Payne Enterprises v. United States, the Court of Appeals for the District of Columbia Circuit held that when records are routinely withheld at the initial processing level, but consistently released after an administrative appeal, and when this situation results in continuing injury to the requester, a lawsuit challenging that practice is ripe for adjudication and is not subject to dismissal on

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[177](...continued)
summary judgment); Messino v. IRS, No. 95-15, slip op. at 1 (D.D.C. Sept. 15, 1995) (case dismissed when plaintiff failed to respond to order requiring proposal of deadline for dispositive motions); Fritchey v. United States, No. 93-1613, slip op. at 3 (D.D.C. Oct. 11, 1994) (plaintiff's failure to respond to government's dispositive motions, after notice from court of consequences of not responding, held to be grounds for dismissal with prejudice); Valona v. DEA, No. 93-1256, slip op. at 1 (D.D.C. May 12, 1994) (plaintiff's failure to comply with court's orders merits dismissal); Warden v. FBI, 530 F. Supp. 66, 68-69 (N.D. Ill. 1981).

[178] See, e.g., Kleinerman v. Patent & Trademark Office, No. 82-295, slip op. at 2-3 (D. Mass. Apr. 25, 1983).

[179] See, e.g., Rodrequez v. United States Postal Serv., No. 90-1886, slip op. at 4-5 (D.D.C. Oct. 2, 1991) (absent submission of further information enabling identification of plaintiff's records from among those of 36 persons with same name, case not yet ripe); National Sec. Archive v. United States Dep't of Commerce, No. 87-1581, slip op. at 6 (D.D.C. Nov. 25, 1987) (fee waiver case).

[180] See, e.g., National Wildlife Fed'n v. Department of the Interior, No. 83-3586, slip op. at 6-7 (D.D.C. Oct. 15, 1987) (suit challenging fee waiver guidelines dismissed as moot after pertinent FOIA section amended).

[181] See, e.g., Voinche v. FBI, 999 F.2d 962, 963 (5th Cir. 1993) (because sole issue in action based on 5 U.S.C. § 552(a)(6)(C) is "tardiness" of agency response, district court litigation rendered moot by agency's disclosure determination); Larson v. Executive Office for United States Attorneys, No. 85-6226, slip op. at 4-5 (D.C. Cir. Apr. 6, 1988) (appeal of district court denial of relief to plaintiff for defendant's processing delays mooted upon completion of processing).

[182] See D'Aleo v. Department of the Navy, No. 89-2347, slip op. at 2-3 (D.D.C. Mar. 27, 1991) (deceased plaintiff's sister, appointed executrix of his estate, substituted as plaintiff). But see Hayles v. United States Dep't of Justice, No. H-79-1599, slip op. at 3 (S.D. Tex. Nov. 2, 1982) (case dismissed upon death of plaintiff when no timely motion for substitution filed).

the basis of mootness.[183] The defendant agency's "voluntary cessation" of that practice in Payne did not moot the case when the plaintiff challenged the agency's policy as an unlawful, continuing wrong.[184]

Of course, a claim for attorney fees or costs survives dismissal of a FOIA action for mootness.[185] When agencies belatedly and without explanation release requested records in the midst of a FOIA lawsuit, courts frown upon efforts to avoid, on mootness grounds, the payment of attorney fees.[186] (See discussion of Attorney Fees and Litigation Costs, below.)

A FOIA lawsuit may be precluded by the doctrine of res judicata (claim

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[183] 837 F.2d 486, 488-93 (D.C. Cir. 1988).

[184] Id. at 491; see also, e.g., Hercules, Inc. v. Marsh, 839 F.2d 1027, 1028 (4th Cir. 1988) (threat of disclosure of agency telephone directory not mooted by release because new request for subsequent directory pending; agency action thus "capable of repetition yet evading review") (reverse FOIA context); Better Gov't Ass'n v. Department of State, 780 F.2d 86, 90-91 (D.C. Cir. 1986) (although challenge to fee waiver standards as applied held moot, challenge to facial validity of standards held ripe and not moot); Public Citizen v. Office of the United States Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (despite disclosure of specific records requested, court retains jurisdiction when plaintiff challenges "agency's policy to withhold temporarily, on a regular basis, certain types of documents"); accord Public Citizen v. OSHA, No. 86-705, slip op. at 2 (D.D.C. Aug. 5, 1987). But see Atkins v. Department of Justice, No. 90-5095, slip op. at 1 (D.C. Cir. Sept. 18, 1991) ("The question whether DEA complied with the [FOIA's] time limitation in responding to [plaintiff's] request is moot because DEA has now responded to this request."); cf. Long v. ATF, 964 F. Supp. 494, 498 (D.D.C. 1997) (rejecting, as not yet ripe, plaintiff's request for determination of status for fee categorization when agency granted request for fee waiver and no new fee dispute remained pending).

[185] See Anderson v. HHS, 3 F.3d 1383, 1385 (10th Cir. 1993) ("`We think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain.'" (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200 (1988))); Carter, 780 F.2d at 1481-82; Seegull Mfg. Co. v. NLRB, 741 F.2d 882, 884-86 (6th Cir. 1984); DeBold, 735 F.2d at 1040; Webb v. HHS, 696 F.2d 101, 107-08 (D.C. Cir. 1982). But cf. Long, 964 F. Supp. at 497-98 (agency's grant of fee waiver renders moot issue of requester's status for purposes of assessing fees on that request).

[186] See, e.g., Phoenix Newspapers, Inc. v. FBI, No. 86-1199, slip op. at 4-5 (D. Ariz. Dec. 12, 1987) (government should not be able to foreclose recovery of attorney fees whenever it chooses to moot an action by releasing records after having denied disclosure at administrative level); Harrison Bros. Meat Packing Co. v. USDA, 640 F. Supp. 402, 405-06 (M.D. Pa. 1986) (finding it "ludicrous" for government to "suddenly and inexplicably" release records and assert mootness to avoid paying fees after having denied disclosure at administrative level).

preclusion) when it is brought by a plaintiff against the same agency for the same documents whose withholding has been previously adjudicated.[187] However, a subsequent claim for records is not precluded by res judicata when the litigation of an earlier, non-FOIA case involving the same records did not permit raising a FOIA claim.[188] In addition, res judicata is not applicable where there has been a change in the factual circumstances or legal principles applicable to the lawsuit.[189]

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[187] See Fazzini v. United States Dep't of Justice, No. 92-5043, slip op. at 1 (D.C. Cir. Oct. 14, 1992) (per curiam); NTEU v. IRS, 765 F.2d 1174, 1177 (D.C. Cir. 1985); Hanner v. Stone, No. 92-CV-72719, slip op. at 3-7 (E.D. Mich. Oct. 26, 1992), aff'd, 1 F.3d 1240 (6th Cir. 1993) (unpublished table decision); see also Schwartz v. United States Dep't of Justice, No. 95-2162, slip op. at 2-3 (D.D.C. May 31, 1996), summary affirmance granted, No. 96-5183 (D.C. Cir. Oct. 23, 1996), cert. denied, 117 S. Ct. 1704 (1997); Greyshock v. United States Coast Guard, No. 94-563, slip op. at 2-3 (D. Haw. Jan. 25, 1996) ("All of the claims brought in the instant actions were undeniably claims which either were or could have been brought in this first action in the District Court for the District of Columbia. For that reason alone, plaintiff is precluded from any further pursuit of these claims in this or any other court.") (appeal pending); Heckman v. Olive, No. CV-88-2981, slip op. at 14 (E.D.N.Y. Dec. 9, 1992), aff'd, 9 F.3d 1537 (2d Cir. 1993) (unpublished table decision); Stimac v. Treasury Dep't, No. 87-C-4005, slip op. at 4 (N.D. Ill. Jan. 15, 1988), aff'd, 872 F.2d 424 (4th Cir. 1989) (unpublished table decision); Crooker v. United States Marshals Serv., 641 F. Supp. 1141, 1143 (D.D.C. 1986); FOIA Update, Summer 1985, at 6 ("FOIA Counselor: `Preclusion' Doctrines Under the FOIA"); cf. Wrenn v. Shalala, No. 94-5198, slip op. at 1-2 (D.C. Cir. Mar. 8, 1995) (affirming dismissal on requests that were subject of plaintiff's previous litigation; reversing dismissal on "claims that were not and could not have been litigated in that prior action"). Compare Hanner v. Stone, No. 92-2565, slip op. at 2 (6th Cir. Aug. 6, 1993) (under doctrine of res judicata, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in a prior action") (emphasis added), with Hanner v. Stone, No. 92-1579, slip op. at 1 (6th Cir. Dec. 8, 1992) (when appellate court had previously adjudicated claim that is similar, but involving different issue, present claim not precluded under doctrine of res judicata).

[188] See North v. Walsh, 881 F.2d 1088, 1093-95 (D.C. Cir. 1989) (claim for records under FOIA not barred by prior discovery prohibition for same records in criminal case in which FOIA claim could not have been interposed).

[189] See, e.g., Graphic Communications Int'l Union, Local 554 v. Salem-Gravure, 843 F.2d 1490, 1493 (D.C. Cir. 1988) (non-FOIA case); Croskey v. United States Office of Special Counsel, No. 94-2756, 1996 U.S. LEXIS 3778, at **7-8 (D.D.C. Mar. 28, 1996) (acknowledging that "changes in `facts essential to a judgment' will render res judicata inapplicable in a subsequent action," but finding that even if true, plaintiff's assertions of changed facts are irrelevant to FOIA analysis) (appeal pending); Wolfe v. Froehlke, 358 F. Supp. 1318, 1219 (D.D.C. 1973) (lawsuit not barred because national security status changed), aff'd, 510 F.2d 654 (D.C. Cir. 1974); see also FOIA Update, Summer 1985, at 6.

Litigation also may be foreclosed by the applicability of the doctrine of collateral estoppel (issue preclusion), which precludes relitigation of an issue previously litigated by one party to the action.[190] As with the doctrine of res judicata, collateral estoppel is not applicable to a subsequent lawsuit if there is an intervening material change in the law or factual predicate.[191]

"Vaughn Index"

A distinguishing feature of FOIA litigation is that the defendant agency bears the burden of sustaining its action of withholding records.[192] The most commonly used device for meeting this burden of proof is the "Vaughn Index," fashioned by the Court of Appeals for the District of Columbia Circuit more than two decades ago in a case entitled Vaughn v. Rosen.[193]

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[190] See Yamaha Corp. of America v. United States, 961 F.2d 245, 254 (D.C. Cir. 1992) (non-FOIA case); Church of Scientology v. United States Dep't of the Army, 611 F.2d 738, 750-51 (9th Cir. 1980) (complete identity of plaintiff and document at issue precludes relitigation); MCI Telecomm. Corp. v. GSA, No. 89-0746, slip op. at 5-7 (D.D.C. Feb. 27, 1995) (same); Williams v. Executive Office for United States Attorneys, No. 89-3071, slip op. at 3-4 (D.D.C. Mar. 19, 1991) (same); see also FOIA Update, Summer 1985, at 6; cf. Cotton v. Heyman, 63 F.3d 1115, 1118 nn.1-2 (D.C. Cir. 1995) (doctrine of direct estoppel, which precludes relitigating issue finally decided in "separate proceeding" within same suit, prevented Smithsonian from challenging district court determination that it is subject to FOIA on appeal from award of attorney fees; however, "Smithsonian is free to relitigate the issue against another party in a separate proceeding"). But see North, 881 F.2d at 1093-95 (issue preclusion inapplicable when exemption issues raised in FOIA action differ from relevancy issues raised in prior action for discovery access to same records); Ely v. FBI, No. 83-876-T-15, slip op. at 4 (M.D. Fla. July 13, 1988) (collateral estoppel not appropriate when plaintiff did not have "full and fair opportunity to litigate" defendant's claim of privilege); Robertson v. DOD, 402 F. Supp. 1342, 1347 (D.D.C. 1973) (private citizen's interest in subsequent FOIA action was not protected by government in prior reverse FOIA suit over same documents because interests not congruent).

[191] See, e.g., Minnis v. USDA, 737 F.2d 784, 786 n.1 (9th Cir. 1984).

[192] See 5 U.S.C. § 552(a)(4)(B) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997); see also O'Harvey v. Office of Workers' Compensation Programs, No. 96-35015, 1997 U.S. App. LEXIS 1363, at **3-4 (9th Cir. Jan. 21, 1997) (vacating grant of summary judgment for government when "the Department failed to submit an affidavit or offer any oral testimony" to sustain its burden of proof on FOIA issues).

[193] 484 F.2d 820 (D.C. Cir. 1973); see, e.g., Canning v. United States Dep't of Justice, 848 F. Supp. 1037, 1042 (D.D.C. 1994) ("Agencies are typically permitted to meet [their] heavy burden by `filing affidavits describing the material withheld and the manner in which it falls within the exemption claimed.'"

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LITIGATION CONSIDERATIONS

The Vaughn Index came into prominence mainly as a result of the 1974 amendments to the FOIA, especially due to the addition of the "reasonably segregable" provision to subsection (b).[194] This requirement that agencies segregate and release disclosable information from that which is exempt grew out of congressional concern in 1974 over the agencies' sweeping application of exemptions up to that time.[195] Particularly in cases involving large numbers of documents, the requirement that courts conduct a de novo review of each portion of a record at issue effectively transferred the burden from agencies to the courts themselves. Moreover, reliance on in camera examination had the effect of weakening the adversarial process somewhat, as it afforded a plaintiff and his counsel no real input on the merits of a case.[196]

The Vaughn decision addressed these concerns by requiring agencies to prepare an itemized index, correlating each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification.[197] Such an index not only makes the trial court's job more manageable, it also enhances appellate review by ensuring that a full public record is available upon which to base an appellate decision.[198] If a court finds that an index is not sufficiently detailed, it may remand and require a more detailed index.[199] However, "[a]ffidavits submitted by an agency are `accorded a pre

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[193](...continued)
(quoting King v. United States Dep't of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987))).

[194] 5 U.S.C. § 552(b) (sentence immediately following exemptions).

[195] See generally H.R. Rep. No. 93-876, at 7 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6292.

[196] See King, 830 F.2d at 218; Vaughn, 484 F.2d at 826; Cucci v. DEA, 871 F. Supp. 508, 514 (D.D.C. 1994) ("An adequate Vaughn index facilitates the trial court's duty of ruling on the applicability of certain invoked FOIA exemptions, gives the requester as much information as possible that he may use to present his case to the trial court and thus enables the adversary system to operate.").

[197] Vaughn, 484 F.2d at 827; accord King, 830 F.2d at 217.

[198] See King, 830 F.2d at 219; Vaughn, 484 F.2d at 824-25; see also Ingle v. Department of Justice, 698 F.2d 259, 263-64 (6th Cir. 1983); cf. Antonelli v. Sullivan, 732 F.2d 560, 562 (7th Cir. 1984) (no index required when small number of documents at issue and affidavit contains sufficient detail); NTEU v. United States Customs Serv., 602 F. Supp. 469, 473 (D.D.C. 1984) (fact that only one exemption is involved "nullif[ies] the need to formulate the type of itemization and correlation system required by the Court of Appeals in Vaughn"), aff'd, 802 F.2d 525 (D.C. Cir. 1986).

[199] See Davin v. United States Dep't of Justice, 60 F.3d 1043, 1065 (3d Cir. 1995); Church of Scientology Int'l v. United States Dep't of Justice, 30 F.3d 224, 230-40 (1st Cir. 1994); Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991);
(continued...)

sumption of good faith.'"[200]

The Vaughn Index has evolved into an extremely effective tool with which to resolve FOIA cases, developing various permutations to fit particular circumstances. Courts have routinely accepted the observation that "[t]here is no set formula for a Vaughn index; . . . it is the function, not the form, which is important."[201] In fact, "[a]ll that is required, and that is the least that is required, is that the requester and the trial judge be able to derive from the index a clear explanation of why each document or portion of a document withheld is putatively exempt from disclosure."[202] Indeed, a document specifically denominated as a "Vaughn Index" is not essential, so long as the nature of the withheld information is adequately attested to by the agency.[203]

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[199](...continued)
Founding Church of Scientology v. Bell, 603 F.2d 945, 949 (D.C. Cir. 1979) (also seemingly establishing requirement that Vaughn Index be contained in no more than one document per case).

[200] Carney v. United States Dep't of Justice, 19 F.3d 807, 812 (2d Cir. 1994) (quoting SafeCard Servs. v. SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); see Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994); Cohen v. FBI, No. 93-1701, slip op. at 4 (D.D.C. Oct. 11, 1994) ("minor contradictions in defendants' affidavits do not evince intentional misrepresentation on their part"). But see Church of Scientology, 30 F.3d at 233 (good-faith presumption applicable only "when the agency has provided a reasonably detailed explanation for its withholdings . . . court may not without good reason second-guess an agency's explanation, but it also cannot discharge its de novo review obligation unless that explanation is sufficiently specific").

[201] Jones, 41 F.3d at 242; Church of Scientology, 30 F.3d at 231; Hinton v. Department of Justice, 844 F.2d 126, 129 (3d Cir. 1988); see Gallant v. NLRB, 26 F.3d 168, 172-73 (D.C. Cir. 1994); Vaughn v. United States, 936 F.2d 862, 867 (6th Cir. 1991) ("A court's primary focus must be on the substance, rather than the form, of the information supplied by the government to justify withholding requested information."); Keys v. United States Dep't of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987).

[202] Jones, 41 F.3d at 242 (Vaughn Index adequate so long as it "`enables the court to make a reasoned independent assessment of the claim[s] of exemption'" (quoting Vaughn, 936 F.2d at 866-67)); Hinton, 844 F.2d at 129; Manna v. United States Dep't of Justice, 832 F. Supp. 866, 873 (D.N.J. 1993).

[203] See, e.g., Miscavige v. IRS, 2 F.3d 366, 368 (11th Cir. 1993) (separate document expressly designated as "Vaughn Index" unnecessary when agency "declarations are highly detailed, focus on the individual documents, and provide a factual base for withholding each document at issue"); Minier v. CIA, 88 F.3d 796, 804 (9th Cir. 1996) ("[W]hen a FOIA requester has sufficient information to present a full legal argument, there is no need for a Vaughn index."); Lewis v. IRS, 823 F.2d 375, 380 (9th Cir. 1987) (Vaughn Index held not required for
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It follows, therefore, that "[t]he degree of specificity of itemization, justification, and correlation required in a particular case will . . . depend on the nature of the document at issue and the particular exemption asserted."[204] However, in order to fulfill its entire intended purpose, a Vaughn Index should either expressly specify[205] or at the very least, in one way or another, plainly indicate[206] that all

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[203](...continued)
Exemption 7(A) withholdings); Brown v. FBI, 658 F.2d 71, 74 (2d Cir. 1981) ("Thus, when the facts in plaintiff's possession are sufficient to allow an effective presentation of its case, an itemized and indexed justification of the specificity contemplated by Vaughn may be unnecessary."); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995) (agency declaration "was adequate in this instance to meet the agency's obligation to justify its withholding"), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Linneman v. FBI, No. 89-505, slip op. at 7-8 (D.D.C. July 13, 1992) ("traditional" index not required to justify withholding solely identities of confidential sources and law enforcement personnel in criminal investigation); NTEU, 602 F. Supp. at 469 (no index required for 44 employee-evaluation forms withheld under Exemption 2); Ferri v. United States Dep't of Justice, 573 F. Supp. 852, 856-57 (W.D. Pa. 1983) (6000 pages of grand jury testimony, not indexed, held sufficiently described); Air Line Pilots Ass'n v. FAA, 552 F. Supp. 811, 815 (D.D.C. 1982) (Vaughn Index not required when agency provided requester with equivalent information).

[204] Information Acquisition Corp. v. Department of Justice, 444 F. Supp. 458, 462 (D.D.C. 1978); see, e.g., Citizens Comm'n on Human Rights v. FDA, 45 F.3d 1325, 1328 (9th Cir. 1995) (for responsive records consisting of 1000 volumes of 300 to 400 pages each, volume-by-volume summary held adequate when Vaughn Indexes "specifically describe the documents' contents and give specific reasons for withholding them"); Davis v. United States Dep't of Justice, 968 F.2d 1276, 1282 n.4 (D.C. Cir. 1992) (precise matching of exemptions with specific withheld items "may well be unnecessary" when all government's generic claims have merit); Vaughn, 936 F.2d at 868 (category-of-document approach approved when over 1000 pages were withheld under Exemptions 3, 5, 7(A), 7(C), 7(D), and 7(E)); Cucci, 871 F. Supp. at 514 ("[C]ontrary to plaintiff's argument, it is not necessary for the exemptions to be listed on the actual pages of the documents."); Agee v. CIA, 517 F. Supp. 1335, 1337-38 (D.D.C. 1981) (index listing 15 categories upheld when more specific index would compromise national security). But see King, 830 F.2d at 224 (requiring more complete Vaughn Index to support Exemption 1 withholding of especially old records).

[205] See, e.g., Army Times Publ'g Co. v. Department of the Air Force, 998 F.2d 1067, 1071 (D.C. Cir. 1993) (inherently erroneous for district court to approve withholding of entire document without entering finding on segregability); Krikorian v. Department of State, 984 F.2d 461, 467 (D.C. Cir. 1993) (same); PHE, Inc. v. United States Dep't of Justice, 983 F.2d 248, 252 (D.C. Cir. 1993) (remand required because of failure of either affidavit or district court to address issue of segregability of Exemption 7(E) material); Wiener, 943 F.2d at 988 ("The court on remand must make a specific finding that no information contained in
(continued...)

segregable information has been disclosed.[207] Questions regarding segregability

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[205](...continued)
each document or substantial portion of a document withheld is segregable."); see also Davin, 60 F.3d at 1052 (rejecting conclusory representation on segregation when declaration failed to describe process by which segregability determinations were made and provided no "factual recitation of why certain materials are not reasonably segregable"); Patterson v. IRS, 56 F.3d 832, 839 (7th Cir. 1995) ("[B]ecause the [agency declaration] lumps all of the withheld information together in justifying nondisclosure, the district court could not have independently evaluated whether exempt information alone was being withheld or deleted in each instance."); Armstrong v. Executive Office of the President, No. 89-142, slip op. at 24-26 (D.D.C. July 28, 1995) (agency must explain, on document-by-document basis, rationale for nondisclosure of unclassified country headings and other unclassified sources of information); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, 818 F. Supp. 1291, 1300 (N.D. Cal. 1992) ("boilerplate" statement that "no segregation of non-exempt, meaningful information can be made for disclosure" deemed "entirely insufficient"); cf. Cucci, 871 F. at 511 (agency not required to segregate material from terminated investigation when so intertwined with still-pending investigations that disclosure would cause Exemption 7(A) harm).

[206] See Church of Scientology, 30 F.3d at 233 (although conclusory representations of nonsegregability regarded as insufficient for lengthy documents, for brief documents "[i]t is fairly inferable from the entries for many of [them] that there is no meaningful segregable non-exempt content"); Canning, 848 F. Supp. at 1049 n.2 ("[T]he agency has carefully and methodically sought to respect the principle [of segregability]" based upon the fact that "the main investigative file consists of 59 pages of which 54 were released in redacted form. Of the seven cross-references, all thirteen pages were released in redacted form."); Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State, No. C-89-1843, slip op. at 12 (N.D. Cal. June 4, 1993) ("specific claim regarding segregability" not required when "brevity of the document in question and the detail in which the contents of the document and the reason for its withholding are described" were sufficient to enable court to discern absence of segregable, non-exempt material); Holland v. CIA, No. 91-1233, slip op. at 22 (D.D.C. Aug. 31, 1992) (proper segregation apparent from express statement by affiant combined with review of documents as redacted); Dusenberry v. FBI, No. 91-665, slip op. at 5 (D.D.C. May 5, 1992) (accepting government's representations that "[t]he subject matter of these specific pages, as described, makes it impossible to segregate disclosable material"). But see, e.g., Oglesby v. United States Dep't of the Army, 79 F.3d 1172, 1181 (D.C. Cir. 1996) (rejecting district court's reliance on fact that only "tiny percentage" of responsive documents were withheld and Army's "evident awareness of the [segregability] requirement" as sufficient evidence that segregability obligation was met); American Petroleum Inst. v. EPA, 846 F. Supp. 83, 90 & n.5 (D.D.C. 1994) (more detailed explanation required when "agency's own descriptions of the withheld documents indicate that segregable segments may be present").

also may be resolved through in camera inspection of the disputed documents by the district court, when necessary.[208]

When voluminous records are at issue, courts have sanctioned the use of Vaughn Indexes based upon representative samplings of the withheld documents.[209] This special procedure "allows the court and the parties to reduce a voluminous FOIA exemption case to a manageable number of items" for the Vaughn Index and, "[i]f the sample is well-chosen, a court can, with some confidence, `extrapolate its conclusions from the representative sample to the larger group of withheld materials.'"[210] Once a representative sampling of the

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[207] See FOIA Update, Summer/Fall 1993, at 11-12 ("OIP Guidance: The `Reasonable Segregation' Obligation").

[208] See Becker v. IRS, 34 F.3d 398, 406 (7th Cir. 1994) (remand unnecessary as judge "did not simply rely on IRS affidavits describing the documents, but conducted an in camera review" (citing Hopkins v. HUD, 929 F.2d 81, 85 (2d Cir. 1991) (absence of district court's findings on segregability warrants "remand with instructions to the district court to examine the inspector reports in camera"))). But see Schiller v. NLRB, 964 F.2d 1205, 1209-10 (D.C. Cir. 1992) (notwithstanding district court's in camera review, case remanded for specific findings on segregability when agency withheld documents in entireties and failed to correlate exemptions with particular record segments to which exemptions applied).

[209] See, e.g., Jones, 41 F.3d at 242 (sample comprising two percent of total number of documents at issue held adequate); Meeropol v. Meese, 790 F.2d 942, 956-57 (D.C. Cir. 1986) (index of sampling of every 100th document allowed when approximately 20,000 documents were at issue); Weisberg v. United States Dep't of Justice, 745 F.2d 1476, 1490 (D.C. Cir. 1984) (index of sampling of withheld documents allowed, when over 60,000 pages at issue, even though no example of certain exemptions provided); Washington Post v. DOD, 766 F. Supp. 1, 15-16 (D.D.C. 1991) (when more than 14,000 pages of responsive material involved, agency should produce detailed Vaughn Index for sample of files, such sample to be determined by parties or court); Peck v. FBI, 3 Gov't Disclosure Serv. (P-H) ¶ 82,353, at 82,916 (N.D. Ohio Nov. 25, 1981) (sample Vaughn Index of "one of every 50 documents" employed "for the purpose of relieving defendants of the burden and expense of preparing a complete index"); cf. Kronisch v. United States, No. 83 CIV. 2458, 1995 WL 303625, at **1 & 13 n.1 (S.D.N.Y. May 18, 1995) (sampling of 50 documents selected by plaintiff, out of universe of approximately 30,000 pages, held appropriate basis for resolution of discovery dispute). But see SafeCard Servs. v. SEC, No. 84-3073, slip op. at 7-9 (D.D.C. May 19, 1988) (burden of indexing relatively small number of requested documents--approximately 200--insufficient to justify sampling).

[210] Bonner v. United States Dep't of State, 928 F.2d 1148, 1151 (D.C. Cir. 1991) (quoting Fensterwald v. CIA, 443 F. Supp. 667, 669 (D.D.C. 1977)). But cf. Martinson v. Violent Drug Traffickers Project, No. 95-2161, 1996 U.S. Dist. LEXIS 11658, at *25 (D.D.C. Aug. 7, 1996) ("This Court does not believe that

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withheld documents is agreed to, however, the agency's subsequent release of some of those documents may destroy the representativeness of the sample and thereby raise questions about the propriety of withholding other responsive, non-sample, documents.[211] In recognition of this danger, the D.C. Circuit has held that an agency "must justify its initial withholdings and is not relieved of that burden by a later turnover of sample documents," and that "the district court must determine whether the released documents were properly redacted [when] initially reviewed."[212]

The courts have generally accepted the use of "coded" indexes--in which agencies break certain FOIA exemptions into several categories, explain the particular nondisclosure rationales for each category, and then correlate the exemption and category to the particular documents at issue.[213] The general acceptability of coded indexes is consistent with the Supreme Court's endorsement of "workable rules" under which general categories of records may be uniformly withheld under FOIA exemptions "without regard to individual circumstances."[214] Innovative formats for "coded" affidavits have been found acceptable, so long as they enhance the ultimate goal of overall "descriptive accuracy" of the affidavit.[215] A "coded" affidavit has been held sufficient when "[e]ach deletion was correlated specifically and unambiguously to the corresponding exemption [which] . . . was adequately explained by functional categories . . . [so as to]

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[210](...continued)
173 pages of located documents is even close to being `voluminous.'").

[211] See Bonner, 928 F.2d at 1153-54.

[212] Id. at 1154; see also Davin, 60 F.3d at 1053 (plaintiff's agreement to sampling does not relieve government of obligation to disclose reasonably segregable, nonexempt material in all responsive documents, including those not part of sample).

[213] See, e.g., Maynard v. CIA, 986 F.2d 547, 559 n.13 (1st Cir. 1993); Keys, 830 F.2d at 349; Canning, 848 F. Supp. at 1043; Steinberg v. United States Dep't of Justice, 801 F. Supp. 800, 803 (D.D.C. 1992), aff'd in pertinent part & remanded in part, 23 F.3d 548 (D.C. Cir. 1994); Albuquerque Publ'g Co. v. United States Dep't of Justice, 726 F. Supp. 851, 859 (D.D.C. 1989); Branch v. FBI, 658 F. Supp. 204, 206-07 (D.D.C. 1987); United States Student Ass'n v. CIA, 620 F. Supp. 565, 568 (D.D.C. 1985); Bevis v. Department of State, 575 F. Supp. 1253, 1255 (D.D.C. 1983). But see Wiener, 943 F.2d at 978-79 (rejecting coded affidavits on ground that such categorical descriptions fail to give requester sufficient opportunity to contest withholdings).

[214] Reporters Comm., 489 U.S. 749, 779-80 (1989).

[215] See National Sec. Archive v. Office of the Indep. Counsel, No. 89-2308, slip op. at 6-7 (D.D.C. Aug. 28, 1992) (when information was withheld by multiple agencies under various exemptions, "alphabetical classification" found properly employed to facilitate coordination of withholding justifications); see also King, 830 F.2d at 225; Canning, 848 F. Supp. at 1043.

place[] each document into its historical and investigative perspective."[216]

The D.C. Circuit has gone so far as to hold that the district court judge's review of only the expurgated documents--an integral part of the "coded" affidavit--was sufficient in a situation in which the applicable exemption was obvious from the face of the documents.[217] However, this approach has been found inadequate when the coded categories are too "far ranging" and more detailed subcategories could be provided.[218] Indeed, when numerous pages of records are withheld in full, a "coded" affidavit that does not specifically correlate multiple exemption claims to particular portions of the pages withheld has been found to be impermissibly conclusory.[219]

Agencies employing "coded" indexes ordinarily attach copies of the records released in part--i.e., the "expurgated" documents--as part of their public Vaughn submission. But agencies seeking to justify withholding records from first-party FOIA requesters should be mindful of the fact that the public filing of expurgated documents about the individual requester (or even detailed descriptions of them in briefs) may constitute a "disclosure" under subsection (b) of the Privacy Act of 1974.[220] Unless proceeding under seal, or with the pri

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[216] Keys, 830 F.2d at 349-50 (citations omitted); see Maynard, 986 F.2d at 559 n.13; cf. Varelli v. FBI, No. 88-1865, slip op. at 5-6 & n.4 (D.D.C. Oct. 4, 1991) (coded index employing "eight separate codes for the national security information withheld" deemed adequate).

[217] Delaney, Migdail & Young, Chartered v. IRS, 826 F.2d 124, 128 (D.C. Cir. 1987); see Whittle v. Moschella, 756 F. Supp. 589, 595 (D.D.C. 1991) ("For two large redactions, the contents are not readily apparent, but since the information there redacted was provided by confidential sources, it is entirely protected from disclosure."); see also King, 830 F.2d at 221 ("Utilization of reproductions of the material released to supply contextual information about material withheld is clearly permissible, but caution should be exercised in resorting to this method of description.").

[218] See King, 830 F.2d at 221-22; cf. Canning, 848 F. Supp. at 1044-45 (approving coded Vaughn Index for classified information and differentiating it from that filed in King).

[219] See Coleman v. FBI, No. 89-2773, slip op. at 9-12 (D.D.C. Apr. 3, 1991) (allowing "coded" affidavit for expurgated pages, but rejecting it as to pages withheld in full), summary affirmance granted, No. 92-5040 (D.C. Cir. Dec. 4, 1992); see also Williams v. FBI, No. 90-2299, slip op. at 11-12 (D.D.C. Aug. 6, 1991) ("coded" affidavit found insufficiently descriptive as to documents withheld in their entireties).

[220] 5 U.S.C. § 552a(b) (1994) (amended 1996, 5 U.S.C.A. § 552a (West Supp. 1997); see, e.g., Krohn v. United States Dep't of Justice, No. 78-1536, slip op. at 2-7 (D.D.C. Mar. 19, 1984), vacated in part on other grounds (D.D.C. Nov. 29, 1984); Citizens Bureau of Investigation v. FBI, No. C78-80, slip op. at 3 (N.D.

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or written consent of the requester, an agency should make such a disclosure only in accordance with one of the exceptions set forth in the Privacy Act--such as the "routine use" or the "court order" exceptions.[221]

In an extreme and markedly unworkable departure from the overall trend toward "workable rules" and more efficient and streamlined Vaughn Indexes, the Court of Appeals for the Ninth Circuit has rejected the government's use of a coded Vaughn Index, even when further supplemented by the district court's in camera review of all withheld documents.[222] In reaching this singular conclusion, the Ninth Circuit placed an unprecedented emphasis upon the role of the Vaughn Index in "afford[ing] the requester an opportunity to intelligently

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[220](...continued)
Ohio Dec. 12, 1979); see also Laningham v. United States Navy, No. 83-3238, slip op. at 2-3 (D.D.C. Sept. 25, 1984), summary judgment granted (D.D.C. Jan. 7, 1985), aff'd per curiam, 813 F.2d 1236 (D.C. Cir. 1987).

[221] 5 U.S.C. § 552a(b)(3), (11); see also, e.g., 53 Fed. Reg. 40,504, 40,505 (1988) (routine use applicable to records in Justice Department's "Civil Division Case File System"); 53 Fed. Reg. 1864, 1865 (1988) (routine uses applicable to records in U.S. Attorneys' Offices' "Civil Case Files").

[222] Wiener, 943 F.2d at 977 (rejecting adequacy of Vaughn Index for withholdings under Exemptions 1, 3, 7(C), and 7(D) for "lack of specificity").